

A Do-Over for Istanbul: Gripping Electoral Law and Democratic Resilience

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On 31 March 2019, Turkey's municipal elections resulted in a shock defeat for the ruling AK Party of president Erdoğan in the overwhelming majority of metropolitan cities. The Supreme Electoral Board canceled the Istanbul election soon after by announcing its reasoning on 22 May. The entire process illustrates how the AK Party has been adjusting the electoral law in a way that has now resulted in the cancellation and re-run of Istanbul's mayoral election.

The AK Party has lost the mayoral race after 25 years in Istanbul, Turkey's economic hub and watershed city for socio-political change. Popular support for the AK Party has declined nation-wide by [1,5 %](#) compared to the [parliamentary elections in 2018](#), but it maintained its votes mostly in the [central, eastern, south-eastern and north-eastern provinces](#).

Upon objections of the AK Party, either all votes or the invalid votes were recounted in 18 districts of Istanbul (approximately [850,000 votes](#)). The recounting took several days, but under effective civic monitoring including the representatives of the opposition and citizen initiatives with a strong commitment to electoral integrity. [The Bureau of the Congress of Local and Regional Authorities of the Council of Europe \(CoE\)](#) decided to maintain its oversight of the Turkish municipal elections during recounting.

According to the recounting, the candidate of the main opposition party CHP, [Ekrem İmamoğlu](#), won the mayoral election in Istanbul with a margin of [13,729 votes](#) against [Binali Yıldırım of AK Party, the last prime minister](#). The prosecutors have launched [investigations](#) upon the AK Party's allegation of "[organized fraud](#)". After an appeal of the AK Party, the Supreme Electoral Board canceled the metropolitan mayoral election. In its [decision](#), the Board focuses on the claims of irregularities particularly regarding the voting tally sheets and the determination of Ballot Box Chairs in 754 boxes out of 31,186. The decision has also indirect, but controversial implications. First, the cancellation grounds will not be applied to the election of district mayors and municipal councils despite the fact that they are elected by the same ballot envelope of metropolitan mayoral election under the oversight of the same Ballot Box Committees. Second, the cancellation ground regarding the Ballot Box Chairs could also be valid for the recent parliamentary and presidential elections in 2018, but this was not previously checked. Hence, this will have no legal impact on them.

The mayoral election will be re-run on 23 June. A do-over for Istanbul opens a new chapter in Turkey's autocratic populism that has purported the electoral victory at the

ballot box as the strong legitimization for a long time. In the current course of events, it does not capture the elections in a conventional manner, but challenges the results through a re-run of the elections. This is a risky strategy as it aims to resurrect power at the ballot box by an electoral victory. The legal and political context of this political gambling supported by the Supreme Electoral Board requires a closer examination since it also has the potential of becoming a common strategy for other populist governments of comparative jurisdictions tending to pseudo-democratic methods. Besides, Istanbul's case urges to rethink the thin veneers of electoral law and gripping practices *via* electoral monitoring bodies in constitutional democracies (see, e.g., [Nic Cheeseman and Brian Klaas, How to Rig an Election](#); [Samuel Issacharoff et. al, The Law of Democracy: Legal Structure of the Political Process](#); [Judith G. Kelley, Monitoring Democracy: When International Election Observation Works, and Why It Often Fails](#)).

Legal framework for electoral stability

Turkey has adopted a system of electoral monitoring since 1950. Currently, the electoral process and standards are pre-defined in detail and in clear terms in [the Law on Basic Provisions on Elections and Voter Registers](#) ("Law on Elections") which also apply to municipal elections. The entire process, including the verification and registration of eligible voters, the composition of Ballot Box Committees and the determination of their chairs, is regulated under the oversight of the Supreme Electoral Board and Municipal Electoral Boards (provincial boards and district boards). The jurisdictional issues as well as the counting, confirmation, finalization, appeal and objection procedures are prescribed comprehensively. The case law, decisions and circulars of the Supreme Electoral Board that have put the electoral law in concrete terms in the last 69 years provide guidance for conducting the elections in a predictable manner.

The electoral administration and monitoring system of Turkey has been developed progressively in consonance with the principles of fair elections and public scrutiny as prescribed in the Constitution and electoral legislation. The principle of stability in electoral legislation is also enshrined in the Constitution and is in line with international good practices, and particularly the [Venice Commission's Code of Good Practice in Electoral Matters](#) (Article 67, paragraph 6): "*Amendments to the electoral laws shall not apply to the elections to be held within one year from the entry into force date of the amendments.*"

This legal framework has secured electoral legitimacy and confidence in the ballot box to a larger extent until recent times, despite allegations of frauds and rigging disputes. Compared to the harsh criticism against the Constitutional Court and the Council of State, the Supreme Electoral Board has never been seriously attacked in public discussions even though it has atypical and extensive powers. These powers comprise both the administration, monitoring and review duties pertaining to the elections to be conducted in a fair and transparent manner. The issues of accessibility and quality of the Board's decisions have been a matter of concern solely in scholarly circles (see particularly, [Levent Gönenç, Türkiye'de Seçim Uyuşmazlıklar ve Çözüm Yolları](#)).

The Supreme Electoral Board, established in 1950, is a constitutional institution that is tasked with securing electoral integrity country-wide. Its decisions are binding and final without being subject to any judicial review. It has 7 members and 4 alternate members, all of them judges who serve six-year terms. The political parties have also representatives in the Board, but without any voting rights. 6 judges are elected by the Court of Cassation and 5 judges are elected by the Council of State, two apex courts of supreme judiciary. Provincial Electoral Boards, too, are also entirely composed of judges, three judges serving two-year terms ([Article 15 of the Law on Elections](#)). The representatives of the political parties have again no voting rights. District Electoral Boards are the most inclusive electoral body. They are presided by a judge but include representatives from the political parties and civil servants as full members with voting rights ([Articles 18 and 19 of the Law on Elections](#)). The fact that judges play a significant role in all electoral boards makes the institutional and decisional quality of them contingent on the independence and impartiality of the judiciary. However, the inclusiveness factor in the District Electoral Boards serves as a safeguard in line with the Venice Commission's Code of Good Practice in Electoral Matters.

Changing the electoral law

The relevance of electoral law has first become evident during Turkey's presidential shift in 2017. The Supreme Electoral Board's reliability has been extensively questioned by the public, primarily in the constitutional referendum in April 2017. The referendum has resulted in Turkey's departure from the long experienced parliamentary system by adopting a sort of presidentialism that augments the executive power of president Erdoğan and completely changes the institutional balance against the parliament. Yet, the amendment was approved by a very narrow margin amid [a controversial decision](#) of the Supreme Electoral Board on the day of the referendum and during the voting process, according to which the ballots that have not been verified by the Ballot Box Committees by stamping are considered valid. This decision did not comply with the explicit wording of the Law on Elections and electoral practices that required stamping. However, the Board stated that priority shall be given to the will of the voters against the omissions of Ballot Box Committees as regards stamping. It emphasized the essence of the right to vote by referring to Article 3 of Protocol No. 1 to the [European Convention of Human Rights](#), but by turning a blind eye to the irregularity according to the wording of the legislation. The Board's decision was [criticized](#) in the public discussions as an unjustified intervention into the voting process that allows electoral frauds. Yet, it has been integrated into the new legislation on elections adopted by the parliamentary majority of the ruling AK Party and its ally Nationalist Movement Party (MHP) right before the snap elections in June 2018 ([Article 98, paragraph 4 of the Law on Elections](#)).

There was no public debate or any attempt of inclusiveness – through public or scholarly consultation – during the preparation of this new legislation. Still, it has provided major changes. They include the allowing of electoral alliances between political parties and other disputable novelties such as the moving or merging of

polling stations based on security considerations and the possibility for voters living in the same building address to be assigned to different polling stations.

All these changes, that were introduced shortly before presidential and parliamentary elections, bring into question, of course, the full respect for the constitutional principle of stability. They were adopted on the ground of an exceptional clause in the constitutional amendment on presidentialism in 2017. The clause has suspended the constitutional principle of stability in order to harmonize the laws of electoral legislation to implement the new presidential system ([provisional Article 21 H of the Constitution](#)). However, the new legislation has not only introduced harmonizing provisions, but has brought about [fundamental changes that have an impact on the electoral management](#). Additionally, the government has extended the tenure of Supreme Electoral Board members to one year (till 2020 and 2023 respectively) before the municipal elections. This reinforces the perceptions of a political bias in the Board. Ignoring the principle of stability, the Constitutional Court has declared this strategic and hasty intervention into the institutional design of electoral monitoring as constitutional since the terms of members are not defined in the Constitution ([E. 2019/14, K. 2019/16, 14 March 2019](#)).

Civil servants as key actors of the new legislation

The leading objection of the ruling AK Party in the Istanbul election relates to a provision that has been introduced by the new legislation. The new legislation stipulates that “civil servants” shall also serve as members of the Ballot Box Committees. The previous legislation prescribed that Ballot Box Committees shall draw their presidents by lot among candidates proposed by the political parties. Under the new legislation, the chair of the Ballot Box Committee shall be a civil servant of the district. He or she is chosen by the president of the relevant District Electoral Board, the senior judge, from a list prepared by provincial governors, but shortened by a lot subject to public scrutiny ([Article 22 of the Law on Elections](#)). Since the provincial governors send the list of civil servants to the District Electoral Board, the Ministry of Interior Affairs can in fact oversee the process. The new legislation also explicitly provides that ordinary citizens in the electoral district can serve in the Ballot Box Committees as members if there is a need and no obstacle for their appointments ([Article 23 final paragraph](#)).

These changes have been criticized by the opposition parties and the Venice Commission. They are concerned about the impartiality since the executive branch has control over the civil servants and there is a risk of arbitrariness to appoint ordinary persons vulnerable to governmental pressure. Nonetheless, these legislative changes are upheld by the Constitutional Court because of civil servants’ duty of impartiality and because the electoral oversight of political parties’ representatives has not been limited ([E. 2018/69, K. 2018/47, 31 May 2018, paras. 45-59](#)). In the Istanbul election, 754 Ballot Box Chairs were not civil servants but other professionals, seemingly [in line with previous electoral practices](#). The AK Party has challenged these Ballot Box Chairs as an irregularity. It has also referred to irregularities regarding voting tally sheets and ineligible voters.

The Supreme Electoral Board's decision: ill-grounded justifications

The Supreme Electoral Board canceled the Istanbul election in a majority ruling of 7 judges out of 11. The Board's decision was announced on 6 May, but the 250-page long reasoning was released on 22 May. The ruling also includes dissenting opinions of 4 judges. Despite the length of the ruling which refers to numerous data (places, names etc.) regarding the irregularity claims, the Board could not demonstrate the reliable argumentation based on concrete evidence that the alleged irregularities were consequential enough to have a decisive impact on the final results of the election. As a reflection of the principle of stability, the Law on Elections requires the fulfillment of the principle of causality in extraordinary appeals as in this case ([Article 130](#)). Accordingly, the irregularity should bear a decisive impact on the electoral outcome. A distinction between significant and insignificant electoral violations are to be made where *de minimis* irregularities do not result in the cancellation of an election – an impactful decision with serious political implications. There are previous decisions of the Board that strictly apply the principle of causality in similar appeals even for small electoral districts where the political impact of a re-run would be less problematic than in Istanbul ([see particularly the dissenting opinions of Cengiz Topakta# and Yunus Ayk#n](#)). Indeed, the Law on Elections expects that political party representatives scrutinize the determination of chairs and raise objections in due time defined in the legislation before the elections. Otherwise, an evidential link is required.

Importantly, the Board does not refer to an evidential link between the irregularities identified and the real distribution of votes in the relevant boxes. First, the Board – strikingly and clearly – admits that the irregularities (lack of signatures, lack of sheets etc.) found in the voting tally sheets of 108 ballot boxes do not have any decisive impact on the electoral outcome by themselves. Second, and incomprehensibly, it concludes that the irregularities in the sheets impair the electoral safety combined with the fact that 754 ballot box chairs are not determined among civil servants. Moreover, the Board focuses, unconvincingly, on the total amount of votes in the relevant boxes, but not the real distribution of the votes at them. In fact, the data on real distribution of the votes between political parties is absolutely necessary as a genuine evidence to make a rightful analysis for a consequential electoral irregularity.

Besides, there is no correlation between the irregularities in the sheets and the ballot boxes where the chairs are not civil servants. As clearly highlighted [in Judge Yunus Ayk#n's dissenting opinion](#), in only 2 out of the disputed 754 ballot boxes there was an irregularity in the sheets (lack of signatures). The number of ineligible voters in the elections was also rather insignificant (706 citizens) with no impact on the results. Finally, the Board ignored the effectiveness of public scrutiny provided by the representatives of political parties in the relevant boxes. There are 5 political representatives in the Ballot Box Committees who can monitor the process and object to the decisions of a chair ([Article 84 paragraph 4 of the Law on Elections](#)).

The number of AK Party representatives (1,104) in the disputed 754 ballot boxes was higher than that of CHP representatives (979).

To sum up, the weaknesses of the ruling result in a highly politicized decision, a pro-government *petitio principii*.

Democratic resilience between mobilization and victimization

The re-run of Istanbul's mayoral election will be a test of democratic resilience for Turkish electoral politics. The mobilization of frustrated voters who did not go to the polls ([1,705,677 voters](#)) and the careless or less educated voters as the owners of invalid votes ([314,243 votes](#)) in the canceled election may play the key role. Kurdish votes that supported the opposition candidate Imamo#lu are still [significant for the end results](#). The recent elections and referendums have witnessed an active civic engagement for electoral integrity conducted by non-partisan groups, such as [Vote and Beyond](#) with its network of observers. Their mobilization may provide an effective monitoring against new fraud strategies since they are well-equipped in Istanbul in terms of human capacity and knowledge. The fact that the opposition parties and their observers have performed well in the recent recounting period is a political advantage for them. The government, however, seems to invest in mobilization campaigns by intensive [presidential meetings and demonstrations](#). Its tight control over the previous, but currently frustrated supporters of the AK Party, other voters and the polls may secure them an [ultimate victory](#). The AK Party's electoral representative network has been wider, pro-active and remarkably dominant at the polls for years.

The government's challenge against the results is primarily based on the argument that the AK Party has won the majority in the district mayoral elections and municipal council elections in Istanbul, but lost the metropolitan mayoral election. The recounting has revealed that there is a positive correlation between the percentage of votes classified as invalid in the first counting and the votes for the AK Party. The former are classified in favor of the AK Party in the recounting. The difference of votes between two candidates has decreased, therefore, to [13,729](#) from [29,408](#). Consequently, the Board's decision and the narrow margin provide political support for the AK Party to repeat its victimization rhetoric for their alleged "[stolen votes](#)" and "[organized fraud](#)" to secure another win at the ballot box. Victimization has been the most powerful argument of the AK Party's populism that mobilized and galvanized its grassroots for years. It remains to be seen whether it will work again against the popularity of another victim, the opposition candidate Imamo#lu.

